

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRANK KLUBEC)	
Claimant)	
VS.)	
)	
BRIGG'S TRUCKING, INC.)	Docket No. 213,100
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from a preliminary hearing Order by Special Administrative Law Judge William F. Morrissey dated August 28, 1996.

ISSUES

Respondent and its insurance carrier request Appeals Board review of the issue regarding whether notice was timely given and, if not, whether there was just cause for claimant's failure to timely report his accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

The Appeals Board has jurisdiction to review the issues raised on appeal from a preliminary hearing pursuant to K.S.A. 44-534a, as amended.

Claimant did not give notice of accident within ten days but just cause was established for claimant's failure to do so and notice was given within 75 days of the accident. Accordingly, the Order by the Special Administrative Law Judge is affirmed.

K.S.A. 44-520 states:

"Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

The time between March 13, 1996, when claimant was injured and April 15, 1996, when notice of accident was given by claimant to respondent exceeds ten days but is less than 75 days. There is no allegation of actual knowledge by the employer, nor that the employer was unavailable to receive notice, nor that claimant was physically unable to give same. Accordingly, claimant must show that he had just cause for his failure to give notice within ten days of the accident date.

Claimant is the owner/operator of a truck leased to respondent. Under the terms of his agreement with respondent, a portion of claimant's earnings are withheld by respondent for payment of workers compensation insurance premiums. It is stipulated by the parties that claimant is an employee of respondent for purposes of the Workers Compensation Act.

Claimant was injured the morning of March 13, 1996, when he slipped and fell while unloading his trailer load of feed grain. Claimant testified that he did not report his injury

initially because he thought he had just pulled a muscle and that he would improve. In addition, claimant was not aware of the ten-day requirement for reporting injuries. Respondent admits that claimant was probably not apprised of any company policy concerning the timely reporting of accidents although a Form 40 was posted in the office. Claimant's symptoms failed to improve and, in fact, continued to worsen until his last day of work on April 22, 1996. Claimant first sought treatment with his family physician, Dr. Nelson P. White. He next went to a chiropractor, Dr. Patrick Murray, who advised claimant that he should stop working. It was then that the claimant decided to report his injury to respondent and to the agent for his insurance carrier.

It is noted that for purposes of this appeal from the preliminary hearing Order that respondent did not challenge the accident as having arisen out of and in the course of claimant's employment with respondent.

Claimant testified that it was common to slip and fall while unloading his truck because the trailer unit is at an angle and the floors are waxed to allow the grain to empty easily. It is also common to have minor aches and pains. Claimant testified it would be unrealistic to report every such accident. Under the circumstances presented herein, the Appeals Board finds that it was not unreasonable for claimant to delay reporting his accident until he determined that his was not simply a minor, temporary injury that would not affect his ability to perform his job. In addition, the nature of the employment relationship between claimant and respondent was one which cannot easily be categorized as an employee/employer relationship as opposed to that of an independent contractor. The parties have stipulated, for purposes of workers compensation, that they are covered by the Act. Nevertheless, the employment relationship also goes to the question of notice because claimant, as an owner/operator, was treated differently than the company drivers. From the record as it currently exists, it cannot be said that claimant knew that he was to report injuries to respondent at all. It was claimant's understanding that he was to deal directly with the insurance carrier. This testimony was supported by Mr. John Briggs, one of the co-owners of respondent Brigg's Trucking. When claimant did report his accident to Mr. Briggs he was advised to call the insurance agent to request workers compensation benefits. Although we do not find, as claimant argues, that claimant was an agent for purposes of receiving notice of accident, the nature of the employment relationship between employer and respondent is, nevertheless, a factor to be considered in determining whether claimant had just cause for his failure to report his accident within ten days. Even so, in finding just cause for his delay in giving notice of accident, the Appeals Board relies predominantly upon the claimant's testimony that he continued working and expected his condition to improve.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order for Compensation entered by Special Administrative Law Judge William F. Morrissey dated August 28, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Jeffrey S. Austin, Overland Park, KS
Bryce Benedict, Administrative Law Judge
Philip S. Harness, Director